

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF HEALTH

In the Matter of Tom's Food Store,  
WIC Vendor No. W6635

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on April 26, 1993, in the Fourth Floor Conference Room, Attorney General's Office, 525 Park Street, St. Paul, Minnesota.

Wendy Willson Legge, Special Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Department of Health. Thomas P. Reiger, Owner, Tom's Food Store, 1030 First Avenue, P.O. Box 66, Gibbon, Minnesota 55335, appeared on behalf of Tom's Food Store. The record closed upon adjournment of the hearing that day.

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner of Health shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner of Health. Parties should contact Marlene Marschall, Commissioner of Health, 717 Delaware Street S.E., Minneapolis, Minnesota 55440, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether the Department properly disqualified Tom's Food Store as a vendor in the WIC program for six months due to failure to maintain the food stock required by Minn. R. 4617.005, subp. 2A(1).

Based upon the record herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. After working in the grocery business for Hi V Foods for fifteen years in New Ulm, Minnesota, and five years in Iowa, Thomas Reiger decided he would like to buy his own grocery store. In March 1991, he purchased the former Bullemer's Super Valu in Gibbon, Minnesota, and renamed it Tom's Food Store.

2. On March 11, 1991, Reiger signed and submitted a Minnesota WIC Program Vendor Application on behalf of Tom's Food Store. Ex. A. The first item in the food price list form attached to the application requested the price the store charged for iron-fortified infant formula, stated that the minimum amount was 31 13-ounce cans of concentrated Similac with Iron or Isomil and asked whether at least that amount was in stock. The question was answered, "yes."

3. The Department sent Tom's Food Store a manual and a WIC Program Retail Food Vendor Guarantee form (the Guarantee). Under the Guarantee, the vendor guarantees to the state that it will comply with certain federal regulations, Minnesota rules and applicable state policies and procedures. The Guarantee goes on to restate several of the WIC Program rules. In particular, paragraph II.A.1. of the Guarantee restates the requirements of Minn. R. 4617.0065, subp. 2A(1), that a retail food vendor must stock and have available at least 31 13-ounce cans of concentrated iron-fortified infant formula of the brand specified by the Department. Ex. B. Reiger signed the Guarantee March 18, 1991, and returned it to the Department. The Guarantee was signed as accepted by a WIC Vendor Liaison on March 19, 1991, and Tom's Food Store was sent a WIC vendor stamp that day bearing WIC Vendor No. W6635. Ex. A. The Guarantee was effective from March 14, 1991, until March 14, 1993.

4. The general procedure used by the WIC Program, which is the Minnesota Special Supplemental Food Program for Women, Infants and Children, is for the women to pick up vouchers for the supplemental food they or their children need from a WIC clinic. The women then purchase those foods from a WIC vendor and pay for it with the voucher. The vendor stamps the voucher with its vendor stamp and deposits it in its bank which receives payment from the Department. In the case of infant formula, the women are issued vouchers for 31 cans, which is a month's supply. They are issued one voucher for 24

cans and one voucher for 7 cans, apparently because infant formula comes in 24-can cases.

5. On November 6, 1992, prior to expiration of the Guarantee, Tom's Food Store submitted a Renewal Application. Ex. C.

6. On March 4, 1993, Heather McGraw, a WIC Vendor Liaison with the Department, conducted an on-site visit or inspection of Tom's Food Store in connection with the reapplication, as is the Department's normal practice. At such inspections, the WIC Vendor Liaison checks to determine that the vendor has the minimum food stock required, checks the food prices to determine if they are within the limitations, reviews any vouchers that are on hand to determine that they have been properly completed and answers any questions the vendor may have. On March 4, 1993, Tom's Food Store had 18 13-ounce cans of concentrated Similac with Iron and no 13-ounce cans of concentrated Isomil . McGraw noted on a Foods Price List form that she used that day that Tom's Food

Store did not have 31 or more cans of 13-ounce concentrate and had only 18 such cans. Ex. D. Reiger was not present that day and McGraw spoke with the cashier on duty, Myrna Buerkle. Buerkle informed McGraw that there was no other infant formula in stock.

7. McGraw provided Buerkle with a notice that the store did not meet the reauthorization criteria for failure to meet the minimum food stock requirements for 31 13-ounce cans of Similac with Iron or Isomil because there were only 18 cans in stock. Ex. E. The notice stated that the vendor stamp had to be returned by April 4, 1993, but that the store could request a second visit before that date and that if the store met the eligibility criteria at that time, it would be offered a two-year renewal. Buerkle signed the form indicating that a second visit was requested.

8. Reiger returned to the store the next day and was given the notice. He ordered another case of Similac with Iron and it was received and put on the shelves some days later. Shortly after the case of Similac was received, someone bought it. That person was not a WIC participant. Reiger was aware that the case had been sold, but didn't think to reorder immediately.

9. Reiger ordered another case of Similac the morning of Tuesday, March 23, 1993, for delivery on Friday, March 26, 1993.

10. Later on March 23, 1993, Kathleen Bennett, another WIC Vendor Liaison, performed a follow-up site inspection at Tom's Food Store. At that time, there were still only the 18 loose cans of 13-ounce concentrate Similac with Iron on the shelves. Bennett counted 14 cans and missed four that had been pushed out of the way. She indicated on her Foods Price List that there were 14 cans of formula present and not the or more cans required. Ex. F. She spoke with Reiger who told her there were four additional cans in stock, that he had forgotten to reorder and that there was more Similac coming. He was very concerned about losing the authority to provide service to WIC participants. Bennett provided him with a WIC Vendor Appeal Procedure Fact Sheet. Ex. G.

11. Bennett determined that Tom's Food Store had not met the minimum food stock requirements and that it did not meet the eligibility criteria during the final on-site review on March 23, 1993. Ex. F, p. 3. On March 24, 1993, she sent Reiger a notice, Ex. H, that because his store did not have the minimum food stock requirement of 31 cans of infant formula at the time of the March 4, 1993, visit and at the time of the March 23, 1993, second visit, the Department was required to disqualify the store from the WIC program for a period of six months. The letter stated that he must return the WIC vendor stamp on or before April 4, 1993, and that he could appeal by April 4, 1993. A second copy of the Appeal Procedure Fact Sheet was enclosed.

12. Reiger received the notice and, by letter of March 25, 1993, requested a hearing to appeal the decision to terminate his WIC vendor authorization. Ex. I. At the same time, Reiger returned the WIC vendor stamp for Tom's Food Store.

13. On April 19, 1993, a Notice of and Order for Hearing, along with a Notice of Appearance, was served upon Reiger. The Notice of and Order for Hearing stated that the purpose of the hearing was to determine whether Tom's

Food Store was properly disqualified for six months pursuant to Minn. R. 4617.0085, for failure to maintain the stock required by Minn. R. 4617.0065, subp. 2A(1). Minn. R. 4617.0085 sets forth the sanctions that must be imposed upon vendors for noncompliance. At the time of the hearing, the Department served an Amended Notice of and Order for Hearing upon Reiger adding an allegation that a six-month disqualification was also required under Minn. R. 4617.0063. That rule deals with reapplications. Reiger did not object to the Amended Notice of and Order for Hearing.

14. Tom's Food Store serves a significant number of WIC participants in the Gibbon area. In February 1993, it sold \$595.38 worth of WIC-approved foods to WIC participants. Of that, a very small part was infant formula.

15. Reiger feels badly about his oversight in not maintaining the required number of cans of Similac in stock and that it will prevent him from providing services to the WIC participants in Gibbon. Tom's Food Store is the only grocery store in Gibbon and the only WIC food vendor there. The next closest grocery store that is an approved WIC food vendor is in Winthrop, which is some seven miles to the east. There is also an approved WIC food vendor in Gaylord, which is another seven miles east of Winthrop and which is also the location of the WIC clinic serving the Gibbon area.

16. Barbara Zust, PHN, the WIC Project Director in the Sibley County Public Health Department at Gaylord, Minnesota, opposes the suspension of Tom's Food Store. In a letter to Senator Durenberger, she states that she is extremely disturbed that Tom's Food Store was shut down as a WIC vendor because Reiger had only 18 cans of Similac on the shelf, rather than 31. She states that the reality is that the people in Gibbon no longer have a store in which to redeem their vouchers because some of them have no transportation and that the closing is creating a definite hardship for those WIC participants. She goes on to state that the WIC participants in Gibbon have never had any problems fulfilling their WIC needs through Tom's Food Store and that she had no record of any complaints by WIC participants that their vouchers could not be accommodated by Reiger. Ex. 2.

17. The WIC Vendor Liaison at the hearing pointed out that because the WIC participants had to go to Gaylord to obtain their vouchers, they could buy their food while there or in Winthrop, which is even closer than Gaylord.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Health have jurisdiction in this matter pursuant to Minn. Stat. 14.50, Minn. R. 4617.0100 and 7 CFR 246.18.

2. Minn. R. 4617.0065 sets forth the eligibility criteria for WIC vendors. In particular, Minn. R. 4617.0065, subp. 2A(1), requires a retail food vendor at all times to keep in stock at least 31 13-ounce cans of concentrated iron-fortified infant formula of the brand specified on the voucher. The brands specified are Similac with Iron and Isomil.



3. On March 4, 1993, and on March 23, 1993, Tom's Food Store had only 18 13-ounce cans of concentrated iron-fortified infant formula in stock and, therefore, did not meet the minimum in-stock requirements of Minn. R. 4617.0065, subp. 2A(1).

4. Minn. R. 4617.0063 requires WIC vendors to submit a reapplication before the ending date of their current guarantee. It requires the Department to disapprove an application of an applicant whose on-site inspection shows the applicant is not in compliance with Minn. R. 4617.0065. Minn. R. 4617.0063, subp. 5, states that an applicant who is disapproved may reapply to be a vendor no sooner than six months after the ending date of the applicant's current vendor guarantee.

5. Tom's Food Store's reapplication was properly disapproved under the provisions of Minn. R. 4617.0063 because the on-site inspections showed that it did not comply with the vendor eligibility criteria of Minn. R. 4617.0065, namely, the minimum in-stock requirements for infant formula.

6. Minn. R. 4617.0085 sets forth the sanctions to be imposed upon vendors for noncompliance with the rules. Under Minn. R. 4617.0085, subp. 2B(1), the Commissioner is required to impose a sanction on a vendor in the form of a disqualification for six months for the first offense and twelve months for each subsequent offense for a vendor who fails to maintain minimum stock of an authorized food as required by Minn. R. 4617.0065, subp. 2.

7. Disqualification of Tom's Food Store for six months is mandatory under the provisions of Minn. R. 4617.0085, subp. 2B(1), for failure to maintain the minimum stock of infant formula.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Health AFFIRM the disapproval and disqualification of Tom's Food Store as a WIC food vendor for six months.

Dated this 30th day of April, 1993.

STEVE M. MIHALCHICK  
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded

MEMORANDUM

It is admitted that Tom's Food Store did not have the minimum amount of infant formula in stock on March 4 and 23, 1993. The shortfall was not due to anything beyond the store's control, it was simply an oversight or failure to reorder promptly. The owner apologizes for that oversight and for the inconvenience that will be caused to the WIC participants in Gibbon. However, the cited rules provide for the mandatory imposition of a six-month disqualification for such a violation and make no provision for waiving that sanction. Where a vendor is the only vendor in a clinic area, the rule provides an option of allowing the vendor to pay a civil money penalty instead of disqualification Minn. R. 4617.0090, subp. 3. Thus, the rules ensure that no WIC participant is unreasonably inconvenienced by a disqualification. However, Tom's Food Store is not the only vendor in the area of the WIC clinic at Gaylord, so that option is not available in this case.

SMM